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No. 87-992

IN THE
Supreme Court of the United States
October Term, 1987

J.E. MCNEIL,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED*

In an action seeking abatement of a civil tax penalty that raises First and Fifth Amendment claims, may a court impose monetary sanctions against the taxpayer's attorney under Rule 11, Fed. R. Civ. P., (a) where the reasons for doing so change constantly, (b) where the court fails to analyze separately each of the claims made on the merits, and (c) where the principal reason offered for imposing sanctions is that the court disagreed with the manner in which the attorney presented the legal arguments contained in her brief?

*In addition to petitioner J.E. McNeil and respondent United States of America, Joan W. Oehser is a respondent in this court. Ms. Oehser was the plaintiff below on whose behalf petitioner McNeil filed the pleadings which subjected her to the sanctions giving rise to this petition. In this petition "respondent" will refer solely to the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. E. McNeil hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum opinion of the district court, dated October 24, 1985, is not reported and is set forth at pages 7a-10a of the appendix to this petition ("App."). The memorandum order of the district court, dated November 18, 1985, denying reconsideration, is not reported and is set forth at App. 12a-13a. The unreported order of the district court awarding attorney's fees, dated December 16, 1985, is set forth at App. 14a. The unpublished order of the district court granting defen-

dant's motion for relief from order, dated February 7, 1986, is set forth at App. 15a.

The unreported memorandum of the court of appeals, dated June 26, 1987, is set forth at App. 1a-6a. The unpublished order denying rehearing is set forth at App. 20a, and the unpublished order denying rehearing *en banc* is set forth at App. 21a. The unpublished order denying petitioner's motion to publish the memorandum of the court of appeals is set forth at App. 17a.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1987. App. 18a-19a. It is reported in the table at 820 F.2d 1341. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on September 18, 1987, App. 20a-21a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as

to harass or to cause unnecessary delay or needless increase in the cost of litigation.

26 U.S.C. §§ 6702 and 6703 are set forth in Appendix L to this petition at App. 22a-24a.

STATEMENT

This petition seeks review of an award of $278.68 against an attorney for a violation of Rule 11 of the Federal Rules of Civil Procedure. The sanction was not imposed because petitioner failed to make a proper factual investigation, since none of the facts were in dispute, nor because the court found that she acted for an improper purpose, such as to delay or to harass the defendant. And while the opinion of the court of appeals is not entirely clear on this, it does not appear that sanctions were upheld because petitioner failed to make a reasonable inquiry as to the applicable law. Rather, petitioner was sanctioned because the lower courts, albeit for different reasons, disapproved of the manner in which petitioner presented the legal arguments on behalf of her client. In order to understand why the imposition of sanctions was improper, and why the rulings below raise important questions which this Court should address, it is necessary to review the controversy which gave rise to them.

A. Facts

Petitioner's client, Joan W. Oehser, is a Quaker who is opposed to having her taxes used to support the military. On her 1983 tax return, she claimed a "conscientious military deduction" in the amount of $4,704.09. The basis for this claim was explained in a letter that she attached to her return, from which it was plain how she calculated the deduction and what her taxes would be without it.

On September 17, 1984, the IRS assessed a $500 civil tax penalty against Ms. Oehser under 26 U.S.C. § 6702, not for failing to pay taxes, but for filing a frivolous return. The notice advised her that she could stay collection of the penalty by filing a claim for refund and paying 15% ($75) within 30 days, which she did. Her claim for refund pointed out that the assessment appeared to be for 1984, but that she had not filed a return for that year which was not yet over. It also protested the absence of an explanation for the assessment and the resulting denial of her due process rights under the Fifth Amendment.

By form letter dated March 8, 1985, the Internal Revenue Service rejected Ms. Oehser's claim, with the sole explanation that "[t]he reasons stated in your claim do not constitute adequate basis for abatement of your penalty." The letter advised her that she had only 30 days from the date of the letter to file suit in order to stay collection of the remainder of the penalty. Accordingly, on April 5, 1985, in order to obtain a substantive response to the objections to the penalty, petitioner followed the only statutorily-provided remedy available to Ms. Oehser and filed a complaint on her behalf against the United States in the United States District Court for the District of Columbia.

B. Proceedings In the District Court

The six-page complaint, plus two pages of exhibits, did not contest the denial of the conscientious military deduction, but only sought review of the $500 penalty, alleging eight separate reasons why no penalty should have been imposed, including claims under the First and Fifth Amendments. The issues raised had not previously been addressed by this Court or by any court in the District of Columbia Circuit. Although many of the claims had been rejected by other courts, including the

Third Circuit in a case that raised most of these issues, that Court had nonetheless described the case as one raising "important statutory and constitutional questions." *Kahn v. United States*, 753 F.2d 1208, 1210 (1985). That court's full opinion -- running more than thirteen pages in the Federal Reporter -- and its recognition that the answers to the questions lay in the proper application of inevitably unpredictable balancing tests, gave petitioner no reason to believe that her arguments had no chance of success, let alone that she would be sanctioned for raising them.

Instead of answering, the government moved to dismiss, and in the same motion it asked the court to impose sanctions against petitioner on the ground that the filing of the complaint violated the certification requirement of Rule 11. The sole support for the government's dual motion was an 11-page memorandum of law, which was principally directed to defending the propriety of the penalty, touching briefly on some, but not all, of the claims raised in the complaint.[1] The argument in support of sanctions was contained in less than two pages. It quoted a portion of Rule 11 and the applicable Advisory Committee note, but cited no other authority. It placed primary reliance on the fact that the deduction claimed by Ms. Oehser was plainly invalid, and that petitioner should have known it. The memorandum suggested, but did not explain, one other possible basis for sanctions -- "the nature of the allegations contained in the complaint concerning the type of deduction claimed (see Compl. para. 8) manifests the merit-

[1]The memorandum did not even mention the first two reasons, *i.e.* (1) that the penalty appeared to be for 1984, and that Ms. Oehser had not filed a return for that year, and (2) that if it was for 1983, it was difficult to understand how that could be proper since, at virtually the same time as the IRS sent Ms. Oehser her penalty assessment, it sent her a letter telling her that it could not find her return for 1983. It also did not discuss the claim based on the IRS's failure to publish its internal guidelines applicable to section 6702.

less position taken." Memo. at 9. Nevertheless, the thrust of the request for sanctions, coming as it did after only the complaint had been filed, was that the government believed that any attorney who files a complaint challenging a penalty imposed on a taxpayer who claimed a conscientious military deduction commits a *per se* violation of Rule 11.

Petitioner subitted a 38-page memorandum in response, all but two pages of which were devoted to challenging the $500 penalty imposed against Ms. Oehser because she decided to make her protest against military spending by claiming a conscientious military deduction on her tax return. In opposing the request for sanctions, petitioner acknowledged that other courts had rejected her arguments against the penalty. She also pointed out that the Government's authorities were not controlling in the D.C. Circuit, noting the Internal Revenue Service's own policy of non-acquiescence in unfavorable decisions in other circuits, and arguing, in effect, for a two-way street. She also cited this Court's recent ruling in *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067 (1985), where Justice Stevens, on behalf of four Justices, made it clear that the Court was very reluctant to impose sanctions on attorneys in connection with the legal arguments that they made. She also pointed out that, although *Talamini* dealt with sanctions for frivolous appeals, "its logic is equally applicable to this case."

On October 24, 1985, without hearing oral argument, the district court issued a four-page memorandum granting both of the goverment's requests. App. 7a-10a. In a single paragraph, the court dealt with the propriety of the penalty, relying principally on decisions of other courts of appeals, which dealt with most, but not all, of Ms. Oehser's claims, and on *United States v. Lee*, 455 U.S. 252 (1982), which, if relevant at all, bore only on the validity of the deduction, which was never at issue in this case.

On the sanctions issue, the district court seemed to suggest that petitioner might have failed to make a "reasonable inquiry" into the law, as is required by Rule 11. App. 9a. However, her motion for reconsideration asserted that she was aware of the law under section 6702; the government did not make, let alone prove, a contrary allegation; and the district court did not find that she failed to make a proper inquiry. Rather, referring to the cases which it used to support the penalty, the district court sanctioned petitioner because, in her reply to the government's motion to dismiss, she "failed to address any of those cases," citing *Textor v. Bd. of Regents of Northern Illinois Univ.*, 87 F.R.D. 751, 754 (N.D. Ill. 1980), App. 10a, a case that the district court failed to note had been reversed two-and-a-half years earlier. *See* 711 F.2d 1387 (7th Cir. 1983).[2]

Petitioner promptly filed a motion for reconsideration, pointing out that simply because a deduction is not allowable, does not mean that a return containing the deduction is automatically frivolous and hence subject to a penalty. Most of the response was devoted to the Rule 11 finding and the potential chilling effect that it would have on counsel. On November 18, 1985, the district court denied the motion, focusing primarily on the way in which petitioner had chosen to argue her client's case and the court's disagreements with the merits of those arguments: "An examination of plaintiff's counsel's contentions in filing the complaint in this action and the arguments made in her brief in opposition to the motion to dismiss, show-

[2]In a footnote, the court admitted that petitioner had cited one of the cases that it found persuasive, App. 10a n.1, although she had actually cited three. However, it faulted petitioner for misstating the holding of the district court in the opinion cited, and for relying on it, even though it had been reversed on appeal. But petitioner had acknowledged the reversal when citing the opinion of the district court, and cited the district court opinion for its logic, not its precedential value.

ed that her arguments were neither well-argued nor well-founded." App. 13a. Thereafter, the court approved the government's request for fees of $278.68, and on January 9, 1986, petitioner filed a notice of appeal from the judgment entered on November 18, 1985.[3]

C. Proceedings in the Court of Appeals

In the court of appeals, petitioner continued to represent Ms. Oehser on the merits of the penalty, but retained separate counsel to represent her on the Rule 11 sanctions, with counsel

[3]Subsequently, the government discovered an error in the order granting sanctions which provided that "plaintiffs [sic] are awarded attorney's fees in the amount of $278.68." App. 14a. The government sought relief from that order and proposed a new order that provided that "the plaintiff is directed to pay to the United States of America within thirty (30) days the sum of $278.68, as a sanction of costs and attorney's fees incurred by the United States in its defense of this action." That motion was not opposed and was granted by the district court. App. 15a. However, defendant subsequently discovered that the first motion to correct had not been sufficient, because the government's order, which the court signed, provided that the plaintiff, rather than the plaintiff's attorney, was to pay the $278.68, and therefore it filed a motion "To Correct Clerical Error." Plaintiff opposed this motion, and the district court has never acted on it. On April 10, 1986, defendant moved to dismiss the appeal on the sanctions issue, arguing that the notice of appeal had been filed only in the name of the plaintiff, and not petitioner McNeil. The court of appeals rejected that argument, finding that it could be fairly inferred that the appeal was on both the merits and sanctions. App. 16a. We believe that that ruling is correct and that this petition is properly before this Court. If the Court does not agree, however, then the remedy would be to dismiss the petition and to order the court of appeals to vacate the judgment as to petitioner since, even as of this date, there has never been a final order entered against her. At that point, a final judgment could be entered against her, she could then appeal, and, if the court of appeals did not alter its views on the propriety of sanctions, a new petition could be filed in this Court. In our view, the petition is properly before this court, but we have set forth all of the applicable facts and our view of their legal consequences since respondent may argue that the petition should be denied on jurisdictional grounds.

filing separate briefs. The government filed a single, 58-page opposition brief, most of which was devoted to the penalty issue, with only eight pages on sanctions.

In an unsigned and unpublished memorandum of less than seven pages, the court of appeals affirmed on both issues. On the sanctions question, the court initially observed that, where sanctions are based on the legal insufficiency of counsel's pleadings, the court will conduct a *de novo* review, in which it is "concerned primarily with the correctness of the district court's ultimate decision to impose sanctions rather than the specific reasons it offered for doing so." App. 3a. Although recognizing the absence of precedent in the D.C. Circuit on the penalty issue, but without analyzing each of the arguments made against the penalty to see whether any of them had merit, even though not ultimately accepted, the court nonetheless sustained the sanctions:

> Here, the legal insufficiency of the arguments alone would probably be grounds enough to sustain the sanctions; the additional factor of McNeil's inadequate discussion of adverse precedent removes any doubt. A "good faith argument" against such a strong current in the law *would have more forthrightly apprised the court of the state of the law, and would have devoted more effort attempting to show its error.* The discussion of *Kahn* and the mention of *Lee* in a footnote, hardly put the court on notice of the courts' almost total rejection of comparable claims by tax protesters.

App. 4a (emphasis added, footnotes omitted). While the court suggested that it was "inconceivable that McNeil was not aware of the inhospitable state of the law," *id.*, it did not uphold the sanctions because she did not know the state of the law. Instead, the court's objection was that if petitioner had really

sought to make a good faith argument against existing law in other circuits, she would have done it differently. Or, stated another way, petitoner was sanctioned because the judges of the court of appeals would have presented the arguments very differently from the way that petitioner had done in her brief in the district court.[4]

A timely petition for rehearing, with a suggestion for rehearing *en banc* was filed, limited to the sanctions issue. The petition was based principally on the conflict between the decision below and that of the Ninth Circuit in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (1986), *on denial of rehearing en banc*, 809 F.2d 584 (1987) ("*Golden Eagle*"), on which petitioner had principally relied in her appellate brief. *Golden Eagle* had rejected sanctions based on the district court's disagreement with the manner in which an attorney's arguments were presented, as had the district court here, yet the court of appeals made no reference to it in its memorandum decision. Both petitions were denied, with Chief Judge Wald voting to grant rehearing, but not rehearing *en banc*. Thereafter, petitioner moved under General Rule 14(e) of the United States Court of Appeals for the District of Columbia Circuit, as amended effective August 1, 1987, to have the opinion published. Although the government did not oppose the motion, the motion was denied with no explanation. App. 17a.

[4]Further confusion about the rationale for the opinion, and hence the potential chilling effect from it, can be seen from the observation that "far from being creative, the theories [advanced by petitioner] had been uniformly and repeatedly rejected." App. 6a. If that is the basis of the appeals court's decision, it would make it impossible for any attorney to ever seek to argue against contrary decisions solely from other circuits. *See also* note 6, *infra*.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Conflict With The Holding Of The Ninth Circuit In *Golden Eagle*, Is Inconsistent With The Principles Applied By Other Courts Of Appeals In Sanctions Cases, And Disregards The Warning By This Court And Others On The Potential Chilling Effects Of Sanctions On First Amendment Rights, Especially In First Amendment Litigation Against The Government.

The principal reason for imposing sanctions against petitioner was that she had presented Ms. Oehser's legal arguments in a manner that the lower courts found wanting. In so ruling, the courts acted directly contrary to the holding of the Ninth Circuit in *Golden Eagle*. In addition, the procedural steps that the other courts have followed before imposing sanctions were not adhered to below, as petitioner was forced to defend herself against changing rationales for the sanctions, and the courts failed to evaluate each of the legal theories that she presented on behalf of Ms. Oehser to determine whether asserting them violated Rule 11.

1. Other courts of appeals that have considered sanctions against attorneys for failure to make reasonable inquiries regarding the applicable law have based their determinations on wholly different principles than those relied on below. The basic approach that they have followed is to insist that attorneys reach a judgment that the case has some possibility of success. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("A good faith belief in the merits of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry' . . . [o]f course, the conclusion drawn from the research undertaken must itself be defensible."); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (Rule 11 violated "*where*,

after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . [or when] it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands ...'') (emphasis in original); *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1435 (7th Cir. 1987) (document must contain ''a plausible view of the law''); *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985)(''An appeal is frivolous [and subject to sanctions under FRAP 38] when the result is obvious or when the appellant's argument is wholly without merit . . . [or where] a competent attorney reasonably should have recognized that [he] had no chance of success.'')[5]

Neither court below cited these decisions or even the D.C. Circuit's similar approach in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1176 (D.C. Cir. 1985), where it approved sanctions because the lawyer ''could not reasonably have read'' a case to support his position, and because the position was ''flatly refuted by the advisory committee notes'' to the rule. Instead, the district court imposed sanctions here because petitioner had failed to cite adverse precedent, even though defendant had previously done so, and the court of appeals upheld the sanction because of ''inadequate discussion of adverse precedent'' and because the panel thought that petitioner should have ''more forthrightly apprised the court of the state of the law, and [should] have devoted more effort attempting

[5]In its brief to the court of appeals, at 54, respondent asserted that ''there is not even a remotely close question presented on any of [Ms. Oehser's claims,]'' yet respondent needed 32 pages of argument, plus 5 1/2 pages of its summary of argument, to answer her contentions on the merits of the penalty.

to show its error." App. 4a. That is, in essence, precisely the kind of "misleading conduct" for which the district court in *Golden Eagle* had imposed sanctions, see 801 F.2d at 1534, and for which the Ninth Circuit reversed: ". . . the district court [erroneously] looked to the manner in which the motion was presented." *Id.* at 1538. While no two sanction cases are identical, the basis for upholding the sanctions here is wholly inconsistent with what other courts have done and is directly contrary to what the Ninth Circuit said in *Golden Eagle* should not be done by "[a]sking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court . . . ." *Id.* at 1540. Or, as one commentator put it, "Rule 11 should not be construed to demand that lawyers behave like judges when prescreening their clients' claims." Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 650 (1987) ("*Harvard*").

2. The Advisory Committee notes on Rule 11, 97 F.R.D. 198, 199, and almost every court that has considered Rule 11, have recognized the potentially chilling effect from imposing sanctions. *Golden Eagle, supra*, 801 F.2d at 1536; *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) (*en banc*) (fear of deterring "unpopular suits"). Similarly, Justice Stevens, speaking for a plurality of four (with Justices White and Powell not joining either opinion), emphasized that "[f]reedom of access to the courts is a cherished value in our democratic society" and refused to impose sanctions on an attorney for seeking review for a meritless claim in this Court. *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067, 1070 (1985). The opinion concluded by affirming that "the strong presumption is against the imposition of sanctions for invoking the processes of the law," *id.* at 1071-72, a presumption that one court put in terms of resolving all doubts against imposing sanctions. *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied sub nom. County of Suffolk v.*

Graseck, 107 S. Ct. 1373 (1987); *see also Golden Eagle*, *supra*, 801 F.2d at 1542 (cautioning against imposing sanctions in close cases). While the court of appeals noted the potential for chill under Rule 11, App. 6a, its actions spoke far louder than its words when it upheld the sanction against petitioner.

Every lawsuit, even one between private parties such as *Talamini*, invokes the First Amendment right to petition the government for redress of grievances, and the possibility of sanctions may chill the exercise of that right. But this case has two additional First Amendment elements to it that further underscore the need for sensitivity before sanctions are imposed, neither of which the lower courts recognized. First, this lawsuit was against the federal government itself, or more precisely, against the powerful and unavoidable Internal Revenue Service. It sought abatement of a monetary penalty which the Service had unilaterally imposed on Ms. Oehser. Under the statute, the only redress available to her, once the IRS had summarily rejected her claim for refund, was to bring this lawsuit within thirty days. Surely, in those circumstances, the court should be particularly reluctant to penalize a taxpayer's attorney, lest sanctions become another means to deter taxpayers from challenging penalties such as those imposed by the IRS here, with no explanation and with only the limited opportunity to file a written protest before suing.

Second, this was not an ordinary penalty. Joan Oehser was assessed a penalty because, as a result of her deeply held religious beliefs, she had filed a tax return protesting the federal government's use of her tax dollars to fund the military. She did so in the only way which she conscientiously could: by reducing her taxes shown on her return through a conscientious military deduction in an amount that she calculated would go to support the military, while providing the government with the information that it would need to calculate her actual

tax liability. She never fought the denial of the deduction, but only the penalty imposed for claiming it. In doing so, she relied, among other grounds, on her First Amendment rights to free expression and freedom of religion as reasons for prohibiting the government from penalizing her for exercising those rights, at least under the circumstances of her case in which she fully and openly disclosed the basis of her protest. To impose sanctions against her attorney for suing to protest that penalty raises the additional First Amendment issue of whether the government may use sanctions to suppress the expression of ideas that it does not want to hear.

3. In light of these First Amendment considerations, the lower courts should have been, but were not, particularly sensitive to the procedural requirements of due process as applied to Rule 11. Thus, there are two other serious defects in the decisions below that set them apart from the decisions of other courts of appeals. First, petitioner raised eight arguments on behalf of Ms. Oehser, yet both the district court and the court of appeals lumped them all together, rejected them all, and then imposed sanctions on a wholesale basis. This approach is directly contrary to that taken by the Second Circuit in *Oliveri v. Thompson, supra,* 803 F.2d at 1276-80, where it carefully reviewed each claim individually to see whether it violated Rule 11. It is also inconsistent with the approach taken in *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985), where the court upheld the sanctions when the district court limited them to one-third of the defendant's attorneys' fees, to distinguish between the proper and improper claims made.

In this case, while some arguments had greater strength than others, and some faced more formidable adverse precedent from other circuits, the courts below treated them as if they were one argument and awarded respondent its full

attorney's fee as a sanction against petitioner for making one or perhaps all of them. That is inconsistent with what other courts have done and is contrary to the conclusion in *Golden Eagle* that Rule 11 is violated only when a pleading as a whole is frivolous, not when some of the arguments are. 801 F.2d at 1540. It is one thing for a court to dismiss a claim on the merits by simply noting that "there is nothing we could add to the reasoning of the numerous courts that have rejected identical or similar challenges ...," App. 3a, but it is quite another to impose sanctions on that basis also.[6]

Second, Rule 11 imposes sanctions for improperly certifying a pleading or other paper in violation of the standards contained in the Rule. The government's motion was directed solely at the complaint, but neither the district court nor the court of appeals sanctioned petitioner for filing a frivolous complaint. Petitioner was sanctioned based on her memorandum in opposition to the motion to dismiss, and yet she was never given advance notice, either by a motion of respondent, or by a *sua sponte* notice from the district court, that her memorandum was alleged to violate Rule 11. Moreover, the

[6]It is often very difficult to tell when an argument has been rejected so often by circuit courts that to raise it again in another circuit leaves an attorney open to Rule 11 sanctions. For instance, last term the Court by an equally divided vote in *Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc.*, 107 S. Ct. 2171 (1987), affirmed a Third Circuit decision which found that a statute violated due process after five other circuits had rejected identical due process claims. And in *McNally v. United States*, 107 S. Ct. 2875 (1987), this Court adopted a construction of the federal mail fraud statute, that, as the two dissenting members of the Court noted, had been rejected by "[e]very court to consider the matter . . .." *Id.* at 2884 (Stevens, J., dissenting).

court of appeals upheld the sanctions, not for the reasons given by the district court, but for its own perceptions of petitioner's failures. App. 3a. This shifting of the basis for sanctions, coupled with the other defects, is inconsistent with the requirement of fair notice and raises due process questions under the Fifth Amendment that are plainly not answered by the fact that petitioner was able to file a motion for reconsideration after the district court first advised her of the basis on which sanctions had already been imposed against her. *See Donaldson v. Clark, supra,* 819 F.2d at 1559-60.

4. There are two other matters that are worthy of comment concerning this petition. While no one likes to pay the federal government any money that is not owed, the $278.68 at stake here is admittedly not large. Yet the same could be said of the statutory penalty assessed against Ms. Oehser, which is less than twice this amount, but Congress obviously thought $500 was sufficient to have a deterrent effect. Neither the petitioner, nor Ms. Oehser, took their appeals from the district court solely because of the money, and this petition is not principally concerned with recovering $278.68. Rather, as the Ninth Circuit recognized in *Golden Eagle,* "what is at stake is often not merely the monetary sanction but the lawyer's reputation." 801 F.2d at 1540. *See also Oliveri v. Thompson, supra,* 803 F.2d at 1280 (beyond economic impact, sanctions may be "professionally harmful"); *Brown v. Federation of State Medical Boards, supra,* 830 F.2d at 1437 (noting effect of sanctions on "an attorney's career and personal well-being").

In this case, upholding the sanctions will have a substantial, detrimental effect on petitioner. Clients may prefer not to be represented by a lawyer, like petitioner, whose professional performance has been criticized and who has been sanctioned by the courts. And in the future, petitioner will have to

think twice before taking cases where there is not a high probability of success, especially if the client espouses an unpopular cause, and the defendant is the federal government. *See* Helkin, *Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1343-44 (1986)("*Helkin*"); *Harvard, supra*, at 639; *Brown, supra*, 830 F.2d at 1437 (expressing concern about chilling claims invloving constitutional rights).

Second, the court of appeals initially declined to publish its memorandum decision, and then refused to do so even though the government did not oppose petitioner's motion. While the court's criteria for publication contained in General Rule 14(b) suggest that the failure to publish indicates that the decision is not important, there is another, less charitable, explanation: the reasons given in the unsigned memorandum will not stand up to the scrutiny which Rule 11 cases are now receiving. *See, e.g.* Vairo, *Report to the Advisory Committee on Amended Rule 11 of the Federal Rules of Civil Procedure* (September 1987)("*Vairo*"). *Helkin, supra; Harvard, supra.*[7]

As an unpublished decision, the memorandum cannot be cited in the D.C. Circuit, General Rule 11(c), and is less likely to chill those whose research produces only published opinions. However, the decision is retrievable on Lexis, and the judgment is officially reported at 820 F.2d 1341, with a notation that there is an accompanying memorandum. And for all those who are aware of this ruling, there is little comfort in the fact that the decision cannot be cited back at petitioner and others, especially since there is no prohibition on the citation of the district court ruling, or of the fact that the decision

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[7]*See also* Levin and Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. U. L. Rev. 587 (1987) ("Levin"), which contains a more sanguine view of the operation of Rule 11.

was affirmed by the court of appeals. Indeed, the district court's decision is in some way more chilling, since it is so clearly at odds with *Golden Eagle*, and yet insofar as the public is aware, the court of appeals simply affirmed that decision.

5. Amended Rule 11 has now been in effect for more than four years. According to a recent report to the Advisory Committee on Civil Rules, there were 564 reported decisions dealing with the amended rule through July 1, 1987, including 147 circuit court rulings. *Vairo, supra*, at 5.[8] According to Professor Vairo, "many have said that Rule 11 has replaced civil RICO as the cottage industry of the litigation bar," and in her opinion "the district courts have yet to receive the guidance they need to apply the rule fairly or uniformly." *Id.* at 5, 9. Her report also concludes that "the fears of some judges, litigators and commentators that [Rule 11] is being abused by particular judges and lawyers [and] is chilling meritorious litigation and effective advocacy . . . appear to be well-founded." *Id.* at 46.

This case presents a particularly appropriate vehicle for the Court to address these concerns and to provide guidance to the lower courts in what is perhaps the most difficult aspect of Rule 11: when to impose sanctions because of the legal insufficiency of a pleading. It also presents important procedural issues relating to the notice required as to the precise reasons for which the attorney is proposed to be sanctioned and the extent of the obligation of the courts to review each of the claims asserted on the merits when the opposition contends that they are so legally insufficient as to be frivolous. And all

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[8]Another estimate, not limited to reported decisions, based on a Lexis run conducted on March 5, 1987, puts the figures at more than 700 district court opinions and 161 at the circuit court level. *Levin, supra*, at 592 n.24, and 600 n.78.

of these issues are presented in a case where the courts should have been particularly sensitive to the potential chilling effect of imposing sanctions because of the First Amendment basis of the dispute on the merits, but were not.

These issues are all worthy of plenary review on their own, but they are made all the more so because the principal ruling below is in direct conflict with the decision of the Ninth Circuit in *Golden Eagle*, and the overall handling of the sanctions issue is inconsistent with the approaches taken in other circuits and in disregard of the warning of the plurality in Talamini. Accordingly, the Court should accept review in this case to resolve these conflicts and provide needed guidance to the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

December 16, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joan W. Oehser v. United States of America

No: 86-5050, June 26, 1987

Before: WALD, Chief Judge, SILBERMAN and D.H. GINSBURG, Circuit Judges.

MEMORANDUM

On April 15, 1984, appellant Joan W. Oehser filed her federal income tax return for 1983, claiming a "conscientious military deduction" in the amount of $4704.09. In a letter to the Internal Revenue Service ("IRS") accompanying her return, she explained that, as a member of the Religious Society of Friends, also known as the Quakers, her religious beliefs prohibit her from supporting the military in any form. By notice dated September 17, 1984, the IRS notified Oehser that, pursuant to Section 6702 of the IRS Code, she had been assessed a penalty of $500 for filing a frivolous return. Pursuant to Section 6703(c) of the Code, Oehser paid 15 percent of the penalty, or $75, and then petitioned the IRS to refund this amount. The IRS denied her claim.

On April 5, 1985, Oehser filed a refund action in the district court, in which she contended that the penalty: (1) violated her Fifth Amendment right to procedural due process, and (2) violated the Administrative Procedures Act because the penalty was based on guidelines that have not been published in the Federal Register. She also claimed that Section 6702: (3) is unconstitutionally vague, (4) denies her equal protection under the Fifth Amendment, (5) violates the First Amend-

ment, and (6) violates her right to freedom of conscience under the First, Fifth, and Ninth Amendments.

In an order dated October 24, 1985, the district court granted the IRS's motion to dismiss for failure to state a claim, and imposed sanctions on Oehser's attorney, J. E. McNeil, pursuant to Fed. R. Civ. P. 11 ("Rule 11"), stating that "[p]laintiff's reasonable inquiry into case law should have disclosed at the very least," the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982), and possibly the decisions in *Welch v. United States*, 750 F.2d 1101 (1st Cir. 1985); *Kahn v. United States*, 753 F.2d 1208 (3d Cir. 1985); *Wall v. United States*, 756 F.2d 52 (8th Cir. 1985), and *Jenney v. United States*, 581 F. Supp. 1309 (C.D. Calif. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985). *Oehser v. United States*, No. 85-1092, slip op. at 4 (D.D.C. Oct. 24, 1985); Joint Appendix ("J.A.") at 79.

On November 4, 1985, McNeil moved for reconsideration of the dismissal of the suit and the imposition of sanctions. The court denied the motion, concluding that McNeil's arguments concerning the unconstitutionality of the penalty "were not well supported and were not 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' " *Oehser v. United States*, No. 85-1092, slip op. at 2 (D.D.C. Nov. 18, 1985) (quoting Rule 11); J.A. at 92. Accordingly, on December 16, 1985, the court upheld the application of sanctions and ordered the plaintiff to pay to the United States costs and attorney's fees in the sum of $278.68.[1]

[1]The district court's order of December 16, 1985 contained a clerical error, the effect of which was to impose the sanction against the defendant rather than the plaintiff's counsel, as indicated in the court's order of October 14, 1985. On February 7, 1986, the district court granted the motion of the United States under Fed. R. Civ. P. 60(a) and corrected the error.

Oehser's statutory and constitutional claims are wholly without merit, and we therefore affirm the dismissal of the action by the district court. Since there is nothing we could add to the reasoning of the numerous courts that have rejected identical or similar challenges to Sections 6702 and 6703, we do not elaborate on the merits. We also find that the imposition of sanctions under Rule 11 was appropriate. Since the decision of whether a pleading is legally sufficient is entitled to *de novo* review in this court, *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), we are concerned primarily with the correctness of the district court's ultimate decision to impose sanctions rather than the specific reasons it offered for doing so. Here it is clear enough that a reasonable attorney could not have concluded, after "reasonable inquiry," that the claims advanced were "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[2]

McNeil maintains that sanctions were inappropriate because, although the claims advanced have been found meritless by every circuit to consider them, *this* court has never considered and rejected the arguments advanced in this case. We have no *per se* rule, however, exempting from sanctions any claim for which there is no controlling case law in the circuit. The sanctions decision requires the court to look to the totality

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[2]We note that, in the memorandum accompanying its order of October 24, 1985, the district court appears to have overlooked McNeil's attempt to distinguish *United States v. Lee, supra*. *See* Opposition to Defendant's Motion to Dismiss ("Opposition Brief") at 18 n.4; J.A. at 52. We also note, as did the court below, that McNeil cited *Jenney, supra*. The district court, however, thought counsel's use of that case misleading, and we agree with the court's assessment: "While recognizing that the trial court's opinion in *Jenney* had been overruled; [sic] counsel, nonetheless, used the district court opinion in support of the proposition it tried to advance." *Oehser v. United States* No. 85-1092, slip op. at 4 n.1. (D.D.C. Oct. 24, 1985) (citation omitted); J.A. at 79.

of circumstances. Here, the legal insufficiency of the arguments alone would probably be grounds enough to sustain the sanctions; the additional factor of McNeil's inadequate discussion of adverse precedent removes any doubt. A "good faith argument" against such a strong current in the law would have more forthrightly apprised the court of the state of the law, and would have devoted more effort attempting to show its error. The discussion of *Kahn*,[3] and the mention of Lee in a footnote,[4] hardly put the court on notice of the courts' almost total rejection of comparable claims by tax protesters.

On April 5, 1985, when the complaint in this case was filed, four courts of appeals[5] and numerous lower courts had sustained penalties imposed pursuant to sections 6702 and 6703 for virtually identical "war tax" claims. It is inconceivable that McNeil was not aware of the inhospitable state of the law; indeed, she served as co-counsel in *Carey v. United States*, 765 F.2d 138 (4th Cir. 1985), in which the Fourth Circuit affirmed, without opinion, an unpublished district court opinion rejecting many of the arguments she urges upon us today. McNeil Brief at 28 n.4.

McNeil points out that she at no time argued that the "war tax" deduction was permissible, but rather challenged the procedures under which the penalty was imposed. She maintains that her strongest argument is that Oehser was entitled to a pre-deprivation hearing, and that the availability of judicial review only after the payment of 15 percent of the penalty violated her due process rights. Congress's power to authorize the assessment and collection of taxes without a prior hear-

[3]Opposition Brief at 12-14; J.A. at 46-48.

[4]Opposition Brief at 18 n.4; J.A. at 52.

[5]*See Welch, Kahn, Wall, Jenney, Franklet v. United States*, 761 F.2d 529 (9th Cir. 1985) (opinion issued after filing of complaint, but before filing of Opposition Brief.

ing, provided that there is a later opportunity for judicial review, was clearly established in *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931), however. The Supreme Court held that summary proceedings to secure prompt performance of tax obligations satisfy the constitutional requirements so long as judicial review is available afterwards. *See also Bob Jones University v. Simon*, 416 U.S. 725, 746-47 (1974). McNeil argues that *Mathews v. Eldridge*, 424 U.S. 319 (1976), placed *Phillips* in doubt, but fails to note that *Mathews* in fact cited *Phillips* with approval, 424 U.S. at 333, as had *Fuentes v. Shevin*, 407 U.S. 67, 92 n.24 (1972).

Not surprisingly, therefore, McNeil's argument was explicitly rejected in the context of "war tax" deductions in *Kahn* and *Franklet, supra*. The predeprivation argument had also been rejected in numerous other cases challenging penalties for other kinds of frivolous deductions. *Anderson v. United States*, 754 F.2d 1270, 1272 (5th Cir. 1985); *Heitman v. United States*, 753 F.2d 33, 35 (6th Cir. 1984); *Brennan v. Commissioner*, 752 F.2d 187, 189 (6th Cir. 1984); *Boomer v. United States*, 755 F.2d 696, 697 (8th Cir. 1985); *Baskin v. United States*, 738 F.2d 975, 977 (8th Cir. 1984); *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985); *Martinez v. United States*, 744 F.2d 71, 72-73 (10th Cir. 1984). In many of these cases, sanctions were imposed for maintaining frivolous appeals.[6]

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[6]It is also worth noting that, subsequent to the filing of the Opposition Brief, other courts of appeals have imposed appellate sanctions upon counsel and the clients they were representing for raising many of the identical claims argued by McNeil. *Eicher v. United States*, 774 F.2d 27 (1st Cir. 1985); *Paulson v. United States*, 758 F.2d 61 (2d Cir. 1985); *Dalton v. United States*, 800 F.2d 1316 (4th Cir. 1986); *Sisemore v. United States*, 797 F.2d 268 (6th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68 (7th Cir. 1986); *Hudson v. United States*, 766 F.2d 1288 (9th Cir. 1985); *Ricket v. United States*, 773 F.2d 1214 (11th Cir. 1985)

We fully appreciate that Rule 11 was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," Fed. R. Civ. P. 11 advisory committee note, but find that, here, far from being creative, the theories had been uniformly and repeatedly rejected. *See Dalton v. United States*, 800 F.2d at 1320. Accordingly, the district court's order dismissing the action and imposing sanctions on plaintiff's counsel pursuant to Rule 11 is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOAN W. OESHER [sic], Plaintiff,	)	
v.	)	Civil Action No.
UNITED STATES OF AMERICA, Defendant.	)	85-1092
	)	FILED
	)	OCT 24 1985

MEMORANDUM

This matter is before the court on defendant's motion to dismiss for plaintiff's failure to state a claim and on defendant's motion for the sanction of attorney's fees against plaintiff for violation of the certification requirement of Rule 11 of the Federal Rules of Civil Procedure. For reasons set forth below, both of defendant's motions are granted.

I. *Background*

Plaintiff filed suit in this court seeking a refund of $75 that she paid to the Internal Revenue Service (IRS) in partial satisfaction of an assessment made against her pursuant to Section 6072 [sic] of the Internal Revenue Code of 1954. That section provides for the imposition of a $500 civil penalty in the case of an income tax return (or purported tax return) that indicates on its face that the taxpayer's self-assessment of taxes due is substantially incorrect, where the substantially incorrect assessment is based on either a "position which is frivolous" or "a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws." 26 U.S.C. § 6702.

Plaintiff filed an income tax return for 1983 in which she claimed a "conscientious military deduction" in the amount

of $4,704.09. Plaintiff contends that her conduct stemmed from her sincerely held religious beliefs based on tenets of her faith prohibiting the payment of taxes in support of the military. Complaint at ¶ 9.

Pursuant to § 6702, the IRS assessed taxpayer a $500 penalty for filing a frivolous income tax return. As provided by § 6703(c), taxpayer paid 15% of the penalty and filed a claim for a refund with the IRS. The IRS subsequently denied her refund claim and plaintiff filed a refund action in this court. Plaintiff contends that the penalty assessed under § 6072[sic]: (1) violated her Fifth Amendment right to procedural due process, (2) violated the Administrative Procedures Act, since the penalty was based on guidelines that have not been published in the Federal Register; (3) that the statute is unconstitutional for vagueness; (4) that the statute violates equal protection under the Fifth Amendment; (5) that the statute violates the First Amendment; and (6) that the statute violates taxpayer's right to freedom of conscience.

II. *Discussion*

A. *Plaintiff's Liability under § 6702*

Tax deductions and credits are a matter of legislative grace and are not allowable unless specifically provided for in the Internal Revenue Code. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934). There is no provision in the Code that even arguably provides for a "conscientious military deduction". Thus, taxpayer's self-assessment was substantially incorrect and was patently frivolous. Both the Supreme Court and various Court of Appeals have repeatedly rejected plaintiff's claims. *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051 (1982); *Welch v. United States*, 750 F.2d 1101 (1st Cir. 1985); *Kahn v. United States*, 753 F.2d 1208 (3rd. Cir. 1985); *Wall v. United States*, 756 F.2d 52 (8th Cir. 1985); *Jenney v.*

United States, 755 F.2d 1384 (9th Cir. 1985). This court is bound by the Supreme Court's decision in *Lee* and finds the court of appeals' cases persuasive. Therefore, defendant's motion to dismiss will be granted.

B. *Rule 11 Sanctions*

The 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure clearly provides that federal courts have a responsibility to impose punishments for violations of the Rule. *Mc Laughlin v. Bradlee*, 602 F. Supp. 1412, 1416 (D.D.C. 1985). Rule 11, in part, provides as follows:

> The signature of an attorney or party [on a pleading, motion or paper] constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, . . . an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11 (Emphasis added).

Plaintiff's reasonable inquiry into case law should have disclosed at the very least, the Supreme Court's decision in *Lee* and possibly the circuit decisions cited *supra*. At the very latest, plaintiff's counsel should have known of those cases when the defendant filed its motion to dismiss, since defen-

dant cited many of those cases in its brief. Plaintiff's counsel's filing a reply to that brief, in which plaintiff's counsel failed to address any of those cases,[1] violated Rule 11. See *Textor v. Bd. of Regents of Northern Illinois Univ.*, 87 F.R.D. 751, 754 (N.D. Ill. 1980). Thus, sanctions should be imposed against plaintiff's counsel in this case.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery

United States District Judge

[1]Plaintiff's counsel did *cite* one of the circuit cases, *Jenney v. United States*, in his brief in opposition. However, counsel completely misstated the holding of the case. While recognizing that the trial court's opinion in *Jenney* had been overruled, counsel, nonetheless, used the district court opinion in support of the proposition it tried to advance. *see* Opposition at 25: *Jenney v. United States*, 755 F.2d 1384 (9th Cir. 1985).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOAN W. OEHSER, Plaintiff,	)	
v.	)	Civil Action No. 85-1092
UNITED STATES OF AMERICA, Defendant.	)	FILED OCT 24 1985

ORDER

This matter is before the court on defendant's motion to dismiss for plaintiff's failure to state a claim and on defendant's motion for the sanction of attorney's fees against plaintiff's counsel for violation of the certification requirement of Rule 11 of the Federal Rules of Civil Procedure. For reasons stated in the accompanying Memorandum, it is, by the court, this 24th day of October, 1985,

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that defendant's motion for attorney's fees under Rule 11 is granted; and it is further

ORDERED that defendant shall file a statement of attorney's fees and costs with the court.

/s/ Thomas A. Flannery

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOAN W. OEHSER,	)	
Plaintiff,	)	Civil Action No.
v.	)	85-1092
UNITED STATES OF AMERICA,	)	FILED
Defendant.	)	NOV 18 1985
	)	

MEMORANDUM ORDER

This matter comes before the court on plaintiff's motion for reconsideration of this court's memorandum and order dated and filed October 24, 1985. That memorandum and order dismissed the action for failure to state a claim and imposed sanctions against plaintiff's attorney under Rule 11 of the Federal Rules of Civil Procedure. For reasons stated below, the plaintiff's motion for reconsideration is denied.

Plaintiff contends that the sole issue she raised in her complaint is the legitimacy of the penalty assessed her by the Internal Revenue Service when she filed a return claiming a "conscientious military deduction." Plaintiff states: "The issue is not whether the deduction is legitimate. Oehser did not argue the legitimacy of her deduction *even at the time of submitting her tax form*." This striking admission of the frivolity of the deduction--or at very least, an admission that the return "contain(ed) information that on its face indicate(d) that the self-assessment (was) substantially incorrect"--compels the conclusion that the penalty provided in § 6702 was correctly imposed.

Although plaintiff contends that the penalty is unconstitutional, the arguments advanced in support of that notion--most notably that plaintiff had no notice of why the Internal Revenue

Service assessed a penalty against her and that the term "self-assessment" and the term "frivolous" in the penalty provision were unconstitutionally vague--were not well supported and were not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

That is not to say that a plaintiff may not challenge unfavorable legal decisions or the constitutionality of statutes. However, challenges to existing laws and the constitutionality of statutes must be well-argued and well-founded. An examination of plaintiff's counsel's contentions in filing the complaint in this action and the arguments made in her brief in opposition to the motion to dismiss, showed that her arguments were neither well-argued nor well-founded. As a result, the court was bound to apply Rule 11 sanctions. *See Westmoreland v. CBS, Inc.*, No. 84-5366 (D.C. Cir. Aug. 20, 1985).

Therefore, for the reasons stated above, it is, by the court, this 18th day of November, 1985,

ORDERED that plaintiff's motion for reconsideration is denied.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOAN W. OESHER [sic],	)	
Plaintiff,	)	Civil Action No.
v.	)	85-1092
UNITED STATES OF AMERICA,	)	FILED
Defendant.	)	DEC 16 1985
	)	

O R D E R

This matter is before the court on the declaration of attorney's fees filed by the government. The court previously awarded attorney's fees to the government in this action. Having examined the declaration of attorneys fees and finding it reasonable, it is, by the court, this 16th day of December, 1985,

ORDERED that plaintiffs are awarded attorney's fees in the amount of $278.68.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOAN W. OESHER [sic],	)	
Plaintiff	)	CIVIL ACTION NO.
v.	)	85-1092
UNITED STATES OF AMERICA,	)	FILED
Defendant	)	FEB 7 1986
	)	

O R D E R

Upon consideration of the defendant's motion for relief from order, including the memorandum of law submitted in support thereof, and having further considered the opposing arguments of the plaintiff, if any, has determined that the motion should and ought to be granted. Accordingly, it is this 7th day of February, 1986,

ORDERED that this Court's previous ORDER dated December 16, 1985, directing the defendant to pay costs and attorney's fees is hereby STRICKEN; and it is further

ORDERED that the plaintiff is directed to pay to the United States within thirty days (30) the sum of $278.68, as a sanction of costs and attorney's fees incurred by the United States in its defense of this action.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1986
C.A. No. 85-01092

No. 86-5050
Joan M. Oehser,
Appellant
v.
United States of America

FILED
SEP 24 1986

BEFORE: Mikva, Edwards, and Williams, Circuit Judges.

ORDER

Upon consideration of the Motion to Dismiss Appeal as to J.E. McNeil for Lack of Jurisdiction and the response thereto, it is

ORDERED, by the Court that the motion be denied. The intent of plaintiff's counsel to appeal the sanctions portion of the order can be fairly inferred from the notice, and there is no evidence that the government was misled by the mistake. *See Brookens v. White,* 795 F.2d 178 (D.C. Cir. 1986). It is

FURTHER ORDERED by the court that a briefing schedule be established as follows:

Appellants' briefs and appendix	October 23, 1986
Appellee's brief	November 24, 1986
Reply briefs, if any	December 8, 1986

Per Curiam

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987
CA No. 85-01092

No. 86-5050
Joan M. Oehser, et al.
v.
United States of America

FILED
OCT 30 1987

BEFORE: WALD, Chief Judge, SILBERMAN and D.H. GINSBURG, Circuit Judges.

ORDER

Upon consideration of the motion of appellant McNeil for publication of the judgment and memorandum of June 26, 1987, it is

ORDERED, by the Court, that the motion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX I
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1986
No. 86-5050 Civil Action No. 85-01092

Joan M. Oehser,
J.E. McNeil,
Appellants

v.

FILED
JUN 26 1987

United States of America

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, Chief Judge, SILBERMAN and D.H. GINSBURG, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, and for the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, by this Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June

15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX J
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
CA No. 85-01092

No. 86-5050
Joan M. Oehser, et al.
v.
United States of America

FILED
SEP 18 1987

BEFORE: WALD, Chief Judge, SILBERMAN and D.H. GINSBURG, Circuit Judges.

O R D E R

Upon consideration of the petition for rehearing of appellant J.E. McNeil, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald would grant the petition for rehearing.

APPENDIX K

UNITED STATES COURT OF APPEALS
THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
C.A. No. 85-01092

No. 86-5050
Joan M. Oehser, *et al.*
v.
United States of America

FILED
SEP 18 1987

BEFORE: Wald, Chief Judge, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges.

O R D E R

The suggestion for rehearing *en banc* of appellant J.E. McNeil has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX L

26 U.S.C.§§ 6702 and 6703

§ 6702. Frivolous income tax return

(a) Civil penalty

If--

(1) any individual files what purports to be a return of the tax imposed by subtitle A, but which--

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties

The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

§ 6703. Rules applicable to penalties under sections 6700, 6701, and 6702

(a) Burden of proof

In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

(b) Deficiency procedures not to apply

Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment or collection of the penalties provided by sections 6700, 6701, and 6702.

(c) Extension of period of collection where person pays 15 percent of penalty

(1) In general

If, within 30 days after the day on which notice and demand of any penalty under section 6700, 6701, or 6702 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Person must bring suit in district court to determine his liability for penalty

If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under section 6700, 6701, or 6702 is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the person fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collection

The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-992

In the Supreme Court of the United States

OCTOBER TERM, 1987

J. E. MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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No. 87-992

J. E. MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in sustaining the district court's imposition against her of sanctions, under Rule 11 of the Federal Rules of Civil Procedure, for advancing unwarranted arguments on behalf of her client in the district court.

1. a. Petitioner's client, Joan W. Oehser, filed a federal income tax return for 1983 on which she claimed a "conscientious military deduction" in the amount of $4,704, which was based on her asserted religious beliefs that prohibited her from supporting the military in any form. On receipt of Oehser's return, the Internal Revenue Service (IRS) assessed a $500 civil penalty under Section 6702 of the Internal Revenue Code.[1] Pet. App. 1a. That Section authorizes the assessment of a $500 civil penalty on the filing of a tax return that either fails to set forth sufficient information "on which the substantial correctness

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

of the self-assessment may be judged" or "contains information that on its face indicates that the self-assessment is substantially incorrect," provided such conduct is due either to "a position which is frivolous" or to "a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws."

Oehser paid 15% of the assessed penalty ($75) and sought a refund.[2] After her administrative claim for refund was denied, petitioner, an attorney, instituted this refund suit on Oehser's behalf in the United States District Court for the District of Columbia. The complaint alleged that the penalty violated Oehser's Fifth Amendment right to procedural due process in failing to provide a predeprivation hearing, that it violated the Administrative Procedure Act because it was based on guidelines that had not been published in the Federal Register, that Section 6702 is unconstitutionally vague, that the penalty denied her equal protection under the Fifth Amendment, that it violated the First Amendment, and that it violated her right to "freedom of conscience" under the First, Fifth, and Ninth Amendments. Pet. App. 1a-2a, 8a. The government moved to dismiss for failure to state a claim, and, in addition, sought an award of attorney's fees as a sanction under Rule 11 of the Federal Rules of Civil Procedure. See Pet. App. 7a.

b. The district court granted the government's motion to dismiss and also imposed Rule 11 sanctions (Pet. App. 7a-10a). The court found that a "conscientious military deduction" was not even arguably allowable and therefore

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[2] Ordinarily, full payment of an assessment is a prerequisite to the filing of a refund suit. See *Flora* v. *United States*, 357 U.S. 63 (1958), aff'd on rehearing, 362 U.S. 145 (1960). Section 6703(c) of the Code, however, permits a refund suit to be brought to challenge a penalty imposed under Section 6702 after payment of only 15% of the penalty.

that Oehser's self-assessment on her return was "substantially incorrect and * * * patently frivolous" (*id.* at 8a). The district court further concluded that sanctions should be imposed upon petitioner under Rule 11, which provides that an attorney's signature on a pleading is a certification "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

The court explained that a reasonable inquiry into the case law would have disclosed at least this Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982), and possibly the numerous court of appeals decisions rejecting arguments identical to those raised by petitioner in Oehser's complaint. In any event, these court of appeals cases were called to petitioner's attention in the government's brief in support of its motion to dismiss, but petitioner failed to address those cases in her reply.[3] Hence, the court concluded that sanctions were appropriate because it did not appear that the pleadings filed by petitioner were based on a belief formed after "reasonable inquiry" that the arguments were well-founded. Pet. App. 9a-10a. Subsequently, the court denied a motion for

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[3] The court noted that petitioner had cited one of the relevant court of appeals cases, but concluded that she had "completely misstated the holding of the case" (Pet. App. 10a n.1). Petitioner had cited *Jenney* v. *United States*, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985), in support of her contentions even though the district court's decision invalidating the Section 6702 penalty had been reversed on appeal. Petitioner also addressed *Lee* briefly and cited one other court of appeals opinion (*Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985)), although she acknowledged that latter decision as adverse authority on only one of the numerous contentions on which it was contrary to Oehser's contentions.

reconsideration (*id.* at 12a-13a). After discussing in further detail the insubstantiality of Oehser's contentions, the court concluded (*id.* at 13a): "An examination of plaintiff's counsel's contentions in filing the complaint in this action and the arguments made in her brief in opposition to the motion to dismiss, showed that her arguments were neither well-argued nor well-founded." Subsequently, the court determined that the amount of the sanctions should be $278.68 in attorney's fees paid to the government (*id.* at 14a).[4]

c. The court of appeals affirmed the district court's decision in all respects in an unpublished memorandum (Pet. App. 1a-6a).[5] With respect to the Rule 11 sanctions,

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[4] The district court's order establishing the amount of the sanctions contained a clerical error. Although the order noted that the court had "previously awarded attorney's fees to the government," the final line ordered "that *plaintiffs* are awarded attorney's fees in the amount of $278.68" (Pet. App. 14a (emphasis added)). The government filed a motion under Fed. R. Civ. P. 60(a) to correct this error, and the court granted the motion and entered a new order (Pet. App. 15a). This order, however, also contains a clerical error. Although the court's various orders and opinions respecting the imposition of Rule 11 sanctions made clear that they were imposed against petitioner, not her client (see *id.* at 10a, 11a, 12a), the second order stated that "the *plaintiff* is directed to pay" the sanctions (*id.* at 15a (emphasis added)). The government made a second motion to correct the order to require that the sanctions be paid by petitioner, but the district court has not yet acted on that motion.

[5] There is a substantial question whether, because petitioner failed to file a notice of appeal, the court of appeals lacked jurisdiction of petitioner's appeal from the imposition of sanctions. The notice of appeal, which was signed by petitioner on Oehser's behalf, stated only that appeal was taken by "Joan W. Oehser, plaintiff above named" (C.A. App. 94) and thus on its face indicated an appeal only of the Section 6702 penalty imposed against Oehser, not an appeal by petitioner herself of the sanctions imposed against her. The court of appeals, however, denied the government's motion to dismiss the appeal for lack of jurisdiction, stating that "[t]he intent of plaintiff's counsel

the court explained that it was "clear enough that a reasonable attorney could not have concluded, after 'reasonable inquiry,' that the claims advanced were 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' " (*id.* at 3a (footnote omitted)). The court rejected petitioner's contention that sanctions could not be imposed because there was no circuit precedent directly on point, noting that there was "no *per se* rule * * * exempting from sanctions any claim for which there is no controlling case law in the circuit" (*ibid.*). Looking to the "totality of circumstances"—both the "legal insufficiency of the arguments" raised by petitioner and her "inadequate discussion of adverse precedent"—the court of appeals found it clear that Rule 11 sanctions were appropriate (*id.* at 3a-4a).

2. The court of appeals correctly held that Rule 11 sanctions were appropriate here, and its decision does not conflict with any decision of this Court or of another court of appeals. Indeed, the courts of appeals have frequently imposed appellate sanctions in connection with challenges

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to appeal the sanctions portion of the order can be fairly inferred from the notice, and there is no evidence that the government was misled by the mistake" (Pet. App. 16a).

We note that petitioner is incorrect in suggesting (Pet. 8 n.3) that such a jurisdictional defect could be corrected by the filing of a new notice of appeal after the district court enters a new order correcting the clerical error in its order establishing the amount of the sanctions (see note 4, *supra*). It is well settled that orders on Rule 60(a) motions to correct clerical errors do not commence a new period for taking an appeal to challenge the merits of the judgment. See, *e.g.*, *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Albers* v. *Gant*, 435 F.2d 146, 148 (5th Cir. 1970); see Fed. R. App. P. 4(a). Accordingly, there is no reason for this Court to consider granting petitioner's alternative request to vacate the judgment of the court of appeals so that she can institute a new appeal.

to the imposition of Section 6702 penalties.[6] And this Court has declined to review a ruling upholding the imposition of Rule 11 sanctions upon an attorney challenging a Section 6702 penalty imposed for filing a "war tax" return. See *Warren* v. *United States*, cert. denied, No. 86-1191 (Apr. 20, 1987). There is no more reason for the Court to grant certiorari here than there was in *Warren*.[7]

Rule 11 permits the district courts to award costs and fees against an attorney or a pro se litigant for filing a pleading where a pre-filing inquiry would have indicated no basis for a good-faith assertion of the position taken therein. The Rule 11 standard, since its amendment in 1983, is one of objective reasonableness. See, *e.g.*, *Indianapolis Colts* v. *Mayor and City Council*, 775 F.2d 177, 181 (7th Cir. 1985); *Eastway Constr. Co.* v. *City of New York*, 762 F.2d 243, 253-254 (2d Cir. 1985), cert. denied, No. 87-359 (Oct. 19, 1987). Inquiry by petitioner into the meaning of Section 6702 would have shown that Oehser's "war tax" return fell squarely within its coverage. The Senate Report (1 S. Rep. 97-494, 97th Cong., 2d Sess. 277-278 (1982)) makes clear that the Section was designed

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[6] See *Dalton* v. *United States*, 800 F.2d 1316 (4th Cir. 1986), cert. denied *sub nom. Warren* v. *United States*, No. 86-1191 (Apr. 20, 1987) ("war tax" deduction); see also *Sisemore* v. *United States*, 797 F.2d 268 (6th Cir. 1986); *Coleman* v. *Commissioner*, 791 F.2d 68 (7th Cir. 1986); *Eicher* v. *United States*, 774 F.2d 27 (1st Cir. 1985); *Ricket* v. *United States*, 773 F.2d 1214 (11th Cir. 1985); *Hudson* v. *United States*, 766 F.2d 1288 (9th Cir. 1985); *Paulson* v. *United States*, 758 F.2d 61 (2d Cir. 1985).

[7] Indeed, petitioner's claim is even weaker than that in *Warren*. The thrust of the petitioner's argument there was that sanctions were inappropriate because the complaint had been filed before the court of appeals had entered its decision reversing the district court in *Jenney* v. *United States*, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985), and thus there was at least one unreversed court decision that supported the contentions raised in the complaint. That is not the case here where the Ninth Circuit had already reversed in *Jenney* before petitioner even filed the complaint on behalf of Oehser.

to deter the filing of tax protest returns. Specifically, the Senate Report states (*id.* at 278) that the Section 6702 penalty applies, inter alia, whenever a taxpayer files:

> a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as * * * a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget * * *.

Thus, it clearly was Congress's intent to penalize the filing of returns such as Oehser's. Moreover, as the district court noted on reconsideration (Pet. App. 12a), petitioner's acknowledgement that Oehser never maintained the legitimacy of the "war tax" deduction amounted to an admission that the Section 6702 penalty was applicable.

The clear applicability of Section 6702 should have been evident to petitioner from a brief examination of relevant court authority. As the court of appeals noted (Pet. App. 4a), at the time petitioner filed the complaint in this case, four courts of appeals had already sustained the imposition of Section 6702 penalties for filing returns containing "war tax" deductions and had rejected arguments virtually identical to those advanced in this case as to the constitutionality of Section 6702. See *Wall* v. *United States*, 756 F.2d 52 (8th Cir. 1985); *Jenney* v. *United States*, 755 F.2d 1384 (9th Cir. 1985); *Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985); *Welch* v. *United States*, 750 F.2d 1101 (1st Cir. 1985). After the filing of the complaint, but prior to the time when petitioner filed the reply to the government's motion to dismiss, two more decisions rejecting similar claims were entered. See *Carey* v. *United States*, 765 F.2d 138 (4th Cir. 1985) (an unpublished decision in a

case in which petitioner served as co-counsel); *Franklet* v. *United States*, 761 F.2d 529 (9th Cir. 1985). Petitioner's determination to pursue this action in the face of the clear contrary authority in the congressional materials and other courts, without making any serious effort to argue why that authority should not be followed, plainly justified the court's imposition of Rule 11 sanctions.

3. Petitioner argues (Pet. 11-13, 20) that the decision below is in "direct conflict" with *Golden Eagle Distributing Corp.* v. *Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), but there manifestly is no conflict between the decisions. In *Golden Eagle*, the district court had recognized that the argument made by counsel was "a worthy one to advance," but it imposed Rule 11 sanctions because of "the manner in which the position was advocated," notably, counsel's failure to cite certain cases that were arguably contrary to its position but that counsel maintained were distinguishable (*id.* at 1535). The court of appeals reversed, finding that the district court's approach excessively diminished the lawyer's role as an advocate. The court explained that Rule 11 does not impose "a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable" (*id.* at 1542). The court of appeals was careful to note, however, that the district courts still retained considerable authority to impose Rule 11 sanctions (*ibid.*): "[W]e do not suggest that the court is powerless to sanction lawyers who take positions which cannot be supported. A lawyer should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless."

Clearly, this case is not comparable to *Golden Eagle*. Here, the district court found that sanctions were justified because petitioner's "arguments were neither well-argued nor well-founded" (Pet. App. 13a). Contrary to petitioner's assertion (Pet. 12-13), the sanctions were not upheld solely because of the manner in which a worthy argument was presented, as was the case in *Golden Eagle*. Instead, the court of appeals below looked to the failure to discuss contrary authority, which had already been cited by the government, only as part of the "totality of circumstances" (Pet. App. 3a-4a) in which the legal insufficiency of petitioner's arguments coupled with her failure to discuss the only court of appeals cases that were on point (albeit adversely) demonstrated a lack of a " 'good faith argument' " (*id.* at 4a). In short, there is no tension whatsoever between *Golden Eagle* and the decision below.[8]

4. Nor is there merit in petitioner's suggestion (Pet. 13-15) that the imposition of sanctions is inappropriate here because of a "chilling effect" on First Amendment rights. As petitioner herself notes (*id.* at 14), every lawsuit can be said to invoke a First Amendment right to petition the government for the redress of grievances. Thus, peti-

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[8] By the same token, the decision below is fully consistent with the other court of appeals' decisions relied upon by petitioner. Most of those cases (see Pet. 11-13) *upheld* the imposition of sanctions where, like here, the pleadings did not appear to be based on a good faith belief, after reasonable inquiry, that the position espoused was justified under the Rule 11 standards. The court of appeals found that all of the claims raised by petitioner were "wholly without merit" (Pet. App. 3a)—a conclusion that cannot seriously be disputed. Therefore, the decision below does not in any way conflict with the principle that it is possible in a single case for some of the arguments made by counsel to justify Rule 11 sanctions while others do not (see Pet. 15-16).

tioner's First Amendment objection appears to be little more than a general claim that Rule 11 is unconstitutional.[9] The simple answer is that there is no First Amendment right to bring frivolous lawsuits, even where the government is the defendant. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983).[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1988

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[9] Petitioner's claim that this case is special because Oehser's filing of the "war tax" return assertedly was an exercise of her First Amendment rights (see Pet. 14-15) is essentially an attempt to argue the merits of the imposition of the Section 6702 penalty, an argument that is not raised in the questions presented and that the courts below correctly rejected as wholly without merit. There is plainly no basis either in Rule 11 or in the Constitution for suggesting that attorneys are immune from Rule 11 sanctions when they file frivolous pleadings in cases that allegedly have First Amendment overtones.

[10] There is no basis for petitioner's contention (Pet. 16-17) that she has been denied due process because of the courts' alleged "shifting of the basis for sanctions" (*id.* at 17). The district court held that her arguments were "neither well-argued nor well-founded" (Pet. App. 13a), and the court of appeals affirmed on the same ground (*id.* at 4a). And both courts found relevant to the lack of good faith the fact that petitioner made little effort to address the contrary authority cited by the government that was directly on point (see *id.* at 3a n.2, 4a, 10a & n.1, 13a).

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UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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IN THE

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REPLY BRIEF IN SUPPORT OF CERTIORARI

The most notable feature of the memorandum in opposition to certiorari is what it does not contain. First and most important, the opposition never suggests that the interpretation of Rule 11, and in particular its applicability where a sanction is based on a finding that the legal position of a party is wholly lacking in merit, is an unimportant question which this Court need not address. In fact, the need for this Court to clarify Rule 11 continues to be demonstrated by the ever-increasing frequency with which the courts of appeals have sought to issue broad decisions in an effort to reduce litigation over the proper construction of the Rule.

Thus, the Fifth Circuit has issued an *en banc* opinion because of the "high import of Rule 11 to both the bench and bar . . .." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866,

868 (1988), joining the Eleventh Circuit which had previously sought to clarify the meaning of the rule in *Donaldson v. Clark*, 819 F.2d 1551 (1987), and the Tenth Circuit which went *en banc* to clarify related questions under Rule 38, Federal Rules of Appellate Procedure, which provides for sanctions for wholly meritless appeals, and under 28 U.S.C. § 1927, which authorizes payment of attorneys' fees when an attorney unreasonably multiplies a proceeding. *Braley v. Campbell*, 832 F.2d 1504 (1987). Hardly an advance sheet of the Federal Second Reporters goes by without one or more significant Rule 11 cases, and in 836 F.2d No. 2, dated February 22, 1988, there were four opinions containing major discussions of the Rule. *See, id.* at 866, 1063, 1068, & 1156. Furthermore, a non-exhaustive review of recent issues of the United States Law Week indicates that there were at least four other petitions filed in this Court between late November and mid-January in which Rule 11 was the major, if not only, question presented, Nos. 87-828, 87-873, 87-1210, and 87-1216, as well as two petitions regarding a case raising similar issues under 28 U.S.C. § 1927, Nos. 87-710 and 87-735.

Second, respondent never mentioned this Court's decision in *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067 (1985), on which the petition prominently relied, and in which the plurality opinion made clear its concerns over the dangers of excessive use of sanctions to dampen the ardor of attorneys taking creative legal positions in support of their clients. Similarly, although purporting to distinguish the Ninth Circuit's opinion in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (1986), respondent never deals with the more fundamental question of the wholly different attitude toward the issue of sanctions between *Golden Eagle* and this case, and the far greater concern for the chilling effect there than shown by the court of appeals here.

The opposition also fails to respond to the point made in the petition regarding decisions from other circuits, such as *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987), and *Donaldson v. Clark*, *supra*, in which the courts were far less willing to impose sanctions than were the courts in this case. Moreover, since the filing of the petition, several courts of appeals have issued opinions which further underscore the fact that the decision below is not in the mainstream of interpretation of Rule 11. *See Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987); *Burull v. First National Bank of Minneapolis*, 831 F.2d 788 (8th Cir. 1987); and *Century Products Inc. v. Sutter*, 837 F.2d 247 (6th Cir. 1988). As Judge Weiss observed in *Morristown Daily Record, Inc. v. Graphic Comm. Union*, 832 F.2d 31, 32 n.1 (3d Cir. 1987), in language which could properly be directed at the decisions in this case: "We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is instead reserved for only exceptional circumstances."

Third, respondent never contends that this case is unsuitable for resolving a number of important questions under Rule 11. The most significant of these is the appropriate standard for deciding when a position is so legally untenable that it violates Rule 11. However, there are a number of other issues, including whether the manner of presentation of a legal argument can ever justify sanctions, as the courts below held it could. In addition, the Court will be able to address what type of notice must be given of the basis for the claim of sanctions, and what kind of opportunity to respond must be afforded. That problem is presented here because of the shifting rationales used first by the government to request sanctions, then by the district court in imposing them and then denying reconsideration of them, and finally by the court of appeals in affirming the award on a still different basis. That aspect

of Rule 11 continues to be an important issue for litigation, albeit in situations somewhat more extreme than that presented here. *See, e.g., Sanko Steamship Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Tom Growney Equip. Inc. v. Shelley Irrig. Develop., Inc.*, 834 F.2d 833 (9th Cir. 1987). And, while not a principal focus of the petition, the standard to be used by the court of appeals in reviewing decisions under Rule 11 needs clarification, especially in light of the recent decision of the Fifth Circuit in *Thomas v. Capital Security Services, Inc., supra*, 836 F.2d at 872, which applied an abuse of discretion standard on an across-the-board basis to all decisions involving Rule 11, a ruling which that court acknowledged was inconsistent with the position taken by many other courts, including the court of appeals here. *See* Pet. App. at 3a. *But see Century Products Inc. v. Sutter, supra*, (majority using abuse of discretion standard to overturn sanction, with concurrence applying *de novo* review).

Instead, most of the opposition is directed at arguing why petitioner's client was not entitled to take a war tax deduction (a matter never at issue in this case), why the penalty under section 6702 was proper (an issue no longer involved in this case), or why petitioner's First Amendment argument is in reality a claim that Rule 11 is unconstitutional as an infringement on the right to petition the government to redress grievances (an argument which we have never made). To the extent that respondent argues the merits of upholding the sanctions decision, that too is not the focus of the debate at this juncture. But if it were, the opposition wholly fails to respond to our contention that if, as respondent suggests, the ruling on the legality of the section 6702 penalty was so "evident" (Opp. at 7), why did the government need nearly 40 pages in its court of appeals' brief to answer the taxpayer's claim?

There are other weaknesses in respondent's defense of the rulings below, but that is not what is now at issue before the

Court. What is before the Court is whether the interpretation of Rule 11, as applied to allegedly meritless legal positions, presents an important question requiring resolution by this Court, and whether this is an appropriate vehicle for doing so. For the reasons set forth above and in the petition itself the answer to both questions is in the affirmative, and therefore review should be granted.[1]

Respectfully submitted,

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[1]It is with some reluctance that we renew the debate over what the Court should do if it determines that, because the notice of appeal did not formally list petitioner as an appellant, the court of appeals lacked jurisdiction over her appeal. See Petition at 8 n.3 and Opp. at 4 n.5. Respondent in effect argues that it is entitled to be hypertechnical in insisting that the notice of appeal be filed in both names, but that it may disregard entirely the fact that there has never been a judgment entered against petitioner for the amount of the sanction. However, the authorities relied on by respondent in note 5 stand only for the proposition that a would-be appellant may not, through the use of a Rule 60(a) motion to correct clerical errors, obtain an extension of time for filing an appeal. They do not apply in this instance because the motions were made by the appellee (respondent here), and they are hardly clerical errors of the kind involved in respondent's cases since here they go to the very identity of the person against whom the judgment is to run. *Cf. Schiavone v. Fortune*, 106 S.Ct. 2379 (1986). While we believe that there is no need to deal with any of these technical issues, since the court of appeals properly determined that all parties understood precisely the nature of the appeals and who was taking them, we are confident that petitioner is not in a situation where both her time for appeal has expired, and she was not properly in the court of appeals.